No. 05-998

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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By order dated October 13, 2006, the Court directed the parties to file supplemental briefs addressing the following question: "Did the indictment omit an allegation that was required by the Fifth Amendment?" The court of appeals held that the indictment in this case was deficient because it alleged only that respondent had engaged in an "attempt[]" to reenter the United States unlawfully on a specified date and at a specified place. See Pet. App. 3a-6a. In its petition for a writ of certiorari, the United States did not seek review of that holding. See Pet. 9 n.3. The position of the United States, however, is that the indictment in this case is in all respects constitutionally valid.[1]

[1] This Court may reach that issue, in its discretion, to the extent that it believes that the issue is a "predicate to an intelligent resolution of the question presented." *United States* v. *Grubbs*, 126 S. Ct. 1494, 1498

A. An Indictment For The Offense Of Attempted Unlawful Reentry Need Only Allege That The Defendant Attempted To Reenter The Country, Not That The Defendant Took A Substantial Step Toward Reentry

The indictment in this case charged respondent with one count of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). As relevant here, that statute imposes criminal penalties on "any alien who * * * has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter * * * attempts to enter * * * the United States" without the consent of the Attorney General (now the Secretary of the Department of Homeland Security, see 6 U.S.C. 202(4), 557 (Supp. IV 2004)). The indictment expressly indicated that respondent was being charged under 8 U.S.C. 1326(a) and further alleged as follows:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

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n.1 (2006) (citation omitted); see *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005) (reaching the question whether a liberty interest existed, despite the State's concession that it did, before considering what process was due).

J.A. 8. Because the indictment sufficiently alleged all of the elements of the offense of attempted unlawful reentry, it satisfied the requirements of the Grand Jury Clause of the Fifth Amendment.

1. As the government explained in its opening brief (at 9-10), this Court has repeatedly held that the Grand Jury Clause requires that every element of a criminal offense be charged in a federal indictment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *United States* v. *Miller*, 471 U.S. 130, 136 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). The purpose of that requirement is to ensure that the grand jury has considered all of the elements of the offense before deciding to indict. Cf. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974) (noting that the responsibilities of the grand jury include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions").

In order to satisfy the requirement that all of the elements of the offense be charged, it is ordinarily sufficient if the indictment "set[s] forth the offense in the words of the statute itself." *Hamling*, 418 U.S. at 117; see *Potter* v. *United States*, 155 U.S. 438, 444 (1894); *United States* v. *Staats*, 49 U.S. (8 How.) 41, 44 (1849); *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 473-474 (1827); see also, *e.g.*, *United States* v. *Webster*, 125 F.3d 1024, 1029-1030 (7th Cir. 1997), cert. denied, 522 U.S. 1051 (1998); *United States* v. *American Waste Fibers Co.*, 809 F.2d 1044, 1046-1047 (4th Cir. 1987). That rule applies unless the terms of the statute do not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling*, 418

U.S. at 117 (quoting *United States* v. *Carll*, 105 U.S. 611, 612 (1882)). The classic application of that exception is where a *mens rea* requirement is read into a statute whose text lacks such a requirement (*e.g.*, *Staples* v. *United States*, 511 U.S. 600, 619 (1994)). See *United States* v. *Opsta*, 659 F.2d 848, 849-850 (8th Cir. 1981).

2. While an indictment must set out all of the elements of the charged offense, it need not elaborate on all of the ingredients of those elements. Of most relevance here, where a statute contains a term of art that has a "definite * * * legal meaning," it is unnecessary for the indictment to include all the "various component parts" that constitute the legal definition of that term. *Hamling*, 418 U.S. at 118-119; see *Staats*, 49 U.S. (8 How.) at 44 (noting that, "when words or terms of art are used in the [statutory] description [of the offense], that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime").[2] Thus, in *Hamling*, the Court held that an indictment alleging that the defendant had mailed "obscene" material was sufficient for purposes of the Grand Jury Clause, even though the indictment failed to allege that the material met the legal definition of "obscenity": *viz.*, by specifying that, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appealed to the

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[2] See also 4 William Blackstone, *Commentaries* *306-*307 (explaining that "in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it," and citing as examples "treasonably," "murdered," "feloniously," "burglariously," and "ravished").

prurient interest. See 418 U.S. at 118-119 (citing *Roth* v. *United States*, 354 U.S. 476 (1957)).[3]

3. Where an indictment charges a defendant with an "attempt" offense, it is unnecessary for the indictment expressly to state that the defendant took a "substantial step" toward completion of the corresponding substantive offense. Like the word "obscene," the word "attempt" is a term of art with a "definite * * * meaning" in federal criminal law. *Hamling*, 418 U.S. at 118-119. It has long been recognized—and, indeed, it is commonly understood—that, in order to engage in an unlawful "attempt," a defendant must take some action toward the completion of the corresponding offense. See, *e.g.*, Model Penal Code § 5.01 commentary at 38-47 (Tentative Draft No. 10, 1960); Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. Pa. L. Rev. 464, 474 (1954). In an effort to harmonize the various (similar if not identical) formulations used by courts to specify the conduct that constitutes an "attempt," see *ibid.*, the Model Penal Code defined an "attempt" as "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the defendant's] com-

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[3] This Court has repeatedly rejected challenges to particular terms in an indictment even where those terms are *not* legal terms of art, provided that those terms are merely tracking the relevant statute. See, *e.g.*, *United States* v. *Debrow*, 346 U.S. 374, 377 (1953) (holding that the phrase "duly taken an oath" is known to mean taking an oath that was "authorized by a law of the United States"); *Potter*, 155 U.S. at 444 (holding that the word "certified" has a "commonly understood" meaning); *United States* v. *Northway*, 120 U.S. 327, 334-335 (1887) (holding that the word "abstract" is a word of "simple, popular meaning, without ambiguity"); *United States* v. *Simmons*, 96 U.S. 360, 362-363 (1878) (holding that the word "distilling" necessarily means the distilling "of alcoholic spirits").

mission of the crime." Model Penal Code § 5.01(1)(c) (1962).

Although there is no general federal statute that expressly defines the conduct element of an "attempt," the Model Penal Code's formulation has been widely adopted by courts construing the many federal statutes that criminalize attempts.[4] In fact, every federal court of appeals has construed at least one federal attempt statute to require that the defendant take a "substantial step" toward the completion of the corresponding substantive offense.[5]

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[4] See, *e.g.*, 18 U.S.C. 81 (arson); 18 U.S.C. 545 (smuggling); 18 U.S.C. 112 (assault of foreign officials); 18 U.S.C. 1113 (murder or manslaughter); 8 U.S.C. 1324 (transportation of illegal aliens); 18 U.S.C. 1751 (presidential assassination or kidnaping); 18 U.S.C. 1832 (theft of trade secrets); 18 U.S.C. 1951 (robbery or extortion); 18 U.S.C. 1956 (money laundering); 18 U.S.C. 2113 (bank robbery); 18 U.S.C. 2119 (carjacking); 18 U.S.C. 2241 (aggravated sexual assault); 18 U.S.C. 2422 (enticement of a minor to engage in illegal sexual activity); 21 U.S.C. 846 (narcotics offenses); 21 U.S.C. 963 (narcotics importation offenses).

[5] See, *e.g.*, *United States* v. *Dworken*, 855 F.2d 12, 16-17 (1st Cir. 1988) (21 U.S.C. 846); *United States* v. *Crowley*, 318 F.3d 401, 407-408 (2d Cir.) (18 U.S.C. 2241(a)(1)), cert. denied, 540 U.S. 894 (2003); *United States* v. *Kwong*, 14 F.3d 189, 194 (2d Cir. 1994) (18 U.S.C. 1113); *United States* v. *Hsu*, 155 F.3d 189, 202 (3d Cir. 1998) (18 U.S.C. 1832(a)(4)); *United States* v. *McFadden*, 739 F.2d 149, 152 (4th Cir.) (18 U.S.C. 2113(a)), cert. denied, 469 U.S. 920 (1984); *United States* v. *Redd*, 355 F.3d 866, 872-873 (5th Cir. 2003) (21 U.S.C. 846); *United States* v. *Thompson*, 130 F.3d 676, 688 (5th Cir. 1997) (18 U.S.C. 1114), cert. denied, 524 U.S. 920 (1998); *United States* v. *Yang*, 281 F.3d 534, 542 (6th Cir. 2002) (18 U.S.C. 1832), cert. denied, 537 U.S. 1170 (2003); *United States* v. *Williams*, 704 F.2d 315, 321 (6th Cir.) (21 U.S.C. 846), cert. denied, 464 U.S. 991 (1983); *United States* v. *Barnes*, 230 F.3d 311, 314 (7th Cir. 2000) (18 U.S.C. 1956(a)(3)(B)); *United States* v. *Rovetuso*, 768 F.2d 809, 821 (7th Cir. 1985) (18 U.S.C. 1512(a)(2)(A)), cert. denied, 474 U.S. 1076 (1986); *United States* v. *Williams*, 136 F.3d 547, 553 (8th Cir. 1998) (18 U.S.C. 2119), cert. denied, 526 U.S. 1003 (1999); *United*

The offense of attempted unlawful reentry, in violation of 8 U.S.C. 1326(a), is no different from other federal attempt offenses in that regard. Some courts have expressly stated that the offense of attempted unlawful reentry requires a substantial step toward unlawful reentry. See *United States* v. *Marte*, 356 F.3d 1336, 1344-1345 (11th Cir. 2004); *United States* v. *De Leon*, 270 F.3d 90, 92 (1st Cir. 2001). Others, in listing the elements of that offense, have said only that the government must show that the defendant "attempted" to reenter the country unlawfully—relying on the accepted legal meaning of an "attempt" to supply the requisite components of that element. See, *e.g.*, *United States* v. *Rodriguez*, 416 F.3d 123, 128 (2d Cir. 2005), cert. denied, 126 S. Ct. 1142 (2006); *United States* v. *Gallagher*, 83 Fed. Appx. 742, 744 (6th Cir. 2003); *United States* v. *Cardenas-Alvarez*, 987 F.2d 1129, 1131-1132 (5th Cir. 1993).

4. In *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188 (2000) (en banc), the Ninth Circuit stated, in listing the elements of the offense of attempted unlawful reentry, that one element of that offense is that "the defendant committed an overt act that was a substantial step towards reentering without * * * consent." *Id.* at 1196. Although the Ninth Circuit's definition of the con-

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States v. *Mims*, 812 F.2d 1068, 1077 (8th Cir. 1987) (21 U.S.C. 843); *United States* v. *Yossunthorn*, 167 F.3d 1267, 1270 (9th Cir. 1999) (21 U.S.C. 841(a)(1)); *United States* v. *Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995) (18 U.S.C. 1956(a)(3)(C)); *United States* v. *Munro*, 394 F.3d 865, 869 (10th Cir.) (18 U.S.C. 2422(b)), cert. denied, 544 U.S. 1009 (2005); *United States* v. *Bunney*, 705 F.2d 378, 381 (10th Cir. 1983) (18 U.S.C. 844(i)); *United States* v. *Plummer*, 221 F.3d 1298, 1303 (11th Cir. 2000) (18 U.S.C. 545); *United States* v. *McDowell*, 705 F.2d 426, 427-428 (11th Cir. 1983) (21 U.S.C. 846); *United States* v. *Duran*, 96 F.3d 1495, 1507-1508 (D.C. Cir. 1996) (18 U.S.C. 1751(c)).

duct element introduces the phrase "overt act" (a phrase now typically associated with the law of conspiracy, see, *e.g.*, 18 U.S.C. 371), it does not appear to diverge substantively from the Model Penal Code's definition of an attempt offense, and therefore appears correctly to define the conduct element of the offense of attempted unlawful reentry.[6]

The Ninth Circuit erred in this case, however, to the extent that it held, based on *Gracidas-Ulibarry*, that respondent's indictment was constitutionally deficient because it did not expressly state that respondent had taken a "substantial step" toward the completion of reentry (or engaged in an "overt act" that constituted such a "substantial step"). See Pet. App. 3a-6a. Because it is well established that, for purposes of a federal criminal statute, an "attempt" requires a substantial step toward the completion of the offense, the indictment in this case sufficiently alleged the conduct element of the offense of attempted unlawful reentry simply by alleging that the defendant "attempted to enter the United States" unlawfully. That allegation mirrored the statutory language and subsumed the legal requirements to commit an attempt.

Although no other court appears to have addressed such a claim with regard to the offense of attempted unlawful reentry specifically, and although there is a paucity of precedent on the issue with respect to other

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[6] This case does not implicate the validity of the Ninth Circuit's actual *holding* in *Gracidas-Ulibarry*: namely, that another element of the offense of attempted unlawful reentry is that the defendant have acted with a "specific intent" to enter illegally. 231 F.3d at 1192. The indictment alleged that respondent "knowingly and intentionally" made his attempt to reenter, J.A. 8, and the court of appeals did not hold that allegation to be insufficient to allege the requisite mental state.

federal attempt offenses, a number of courts have rejected claims that indictments for other federal attempt offenses must allege, in so many words, that the defendant took a "substantial step" toward the completion of the corresponding offense. See, *e.g.*, *United States* v. *Toma*, No. 94-CR-333, 1995 WL 65031, at *1 (N.D. Ill. Feb. 13, 1995) (holding that, "for indictment purposes, use of the word 'attempt' is sufficient to incorporate the substantial step element," on the ground that "[t]he word 'attempt' necessarily means taking a substantial step" and "it is the language of the statute and the language of the statute generally is sufficient to state a charge"; see also, *e.g.*, *United States* v. *McDarrah*, No. 05-CR-1182 (PAC), 2006 WL 1997638, at *8 (S.D.N.Y. July 17, 2006); *United States* v. *Wood*, 6 F. Supp. 2d 1213, 1218 (D. Kan. 1998).

5. A rule that required an indictment for an "attempt" offense to recite that the defendant took a "substantial step" toward completion of the corresponding substantive offense would cast doubt on numerous federal indictments, because, in drafting indictments, federal prosecutors frequently allege merely that the defendant "attempted" to engage in the substantive offense. See, *e.g.*, *United States* v. *Crayton*, 357 F.3d 560, 567 (6th Cir.) (indictment charging that the defendant "did attempt to knowingly and intentionally possess with intent to distribute . . . cocaine"), cert. denied, 542 U.S. 910 (2004). And it would effectively require the indictment to contain the same level of particularity as a petit jury instruction with regard to the conduct element of an "attempt" offense—in serious tension not only with the Grand Jury Clause as it has hitherto been construed, but also with the rule that an indictment need only contain "a plain, concise, and definite written

statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1).[7]

More generally, prevailing federal practice typically relies on incorporating the language of the statute into an indictment in order to convey to the defendant the legal meaning and subsidiary requirements of the charged offense. Indictments for mail fraud (18 U.S.C. 1341) charge that a defendant engaged in a "scheme or artifice to defraud." Indictments for murder (18 U.S.C. 1111) charge that a defendant acted with "malice aforethought." Indictments for extortion (18 U.S.C. 1951) charge that a defendant acted "under color of official right." Indictments for civil rights violations (18 U.S.C. 242) charge that a defendant acted "under color of law." All of these terms, as explicated in case law, contain subcomponents that a jury must find in order to return a verdict of guilty.[8] But it would seriously depart from the

[7] Such a rule would also be in some tension with Federal Rule of Criminal Procedure 31(c), which allows a defendant to be found guilty not only of "an offense necessarily included in the offense charged" (*i.e.*, a lesser included offense, see *Schmuck* v. *United States*, 489 U.S. 705, 717-721 (1989)), but also of "an attempt to commit the offense charged" or "an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right." It would be incongruous to conclude that a defendant, in a case like this, could be convicted of an attempt offense when the indictment charged him only with the corresponding substantive offense, but that a defendant could not be convicted of a *charged* attempt offense when the indictment alleges only an "attempt" and does not specifically allege a "substantial step" toward completion of the corresponding offense. See *Toma*, 1995 WL 65031, at *1.

[8] See *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (scheme to defraud must involve "material" falsehoods); *Schad* v. *Arizona*, 501 U.S. 624, 640-641 (1991) (plurality opinion) (describing mental states that satisfy the common-law meaning of malice aforethought); *Evans* v. *United States*, 504 U.S. 255, 268 (1992) (extortion under color of official

manner in which federal prosecutors typically frame indictments to hold that the charging instrument must spell out all of those subcomponents.

B. An Indictment For The Offense Of Attempted Unlawful Reentry Need Not Specify The Specific Steps That The Defendant Took Toward Reentry

The court of appeals seemingly suggested that the indictment in this case was constitutionally deficient not only because it did not expressly state that respondent had taken a "substantial step" toward the completion of reentry, but also because it did not *specify* what step (or steps) respondent had taken: *e.g.*, by alleging that respondent had presented false identification at a port of entry. See Pet. App. 3a-6a. But the Fifth Amendment does not require that an indictment include the factual means by which the government will prove the elements of an offense. And because the indictment did provide sufficient factual detail to allow respondent to prepare his defense, it afforded respondent sufficient notice of the charged offense for purposes of the Grand Jury Clause of the Fifth Amendment and other constitutional provisions.

1. As the government explained in its opening brief (at 24-25), the Constitution requires that, in a federal or state prosecution, a defendant be given notice of the nature of the charge against him. A claim that an indictment is deficient because it fails to provide sufficient notice of the charge is conceptually distinct from a claim that the indictment is deficient because it fails to allege

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right satisfied by receipt of unauthorized payment in return for official acts); *United States* v. *Price*, 383 U.S. 787, 794 (1966) (color of official right encompasses private person willfully participating in joint activity with the State or its agents).

all of the elements of the offense. A notice claim is textually rooted in the Sixth Amendment, which provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation." See, *e.g.*, *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876) (stating that, under the Sixth Amendment, "the indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged") (citation and internal quotation marks omitted). This Court has also suggested that it is rooted, at least to some extent, in the Grand Jury Clause itself. See, *e.g.*, *Hamling*, 418 U.S. at 117 (noting, apparently in reliance on the Grand Jury Clause, that an indictment not only must "contain[] the elements of the offense charged," but also must "fairly inform[] a defendant of the charge against which he must defend").

2. The indictment in this case was valid because it provided sufficient factual detail to enable respondent to prepare his defense. While this Court has repeatedly stated that the indictment must set forth the alleged crime "with reasonable particularity of time, place, and circumstances," *United States* v. *Hess*, 124 U.S. 483, 488 (1888) (quoting *Cruikshank*, 92 U.S. at 558), it has also cautioned that an indictment need not include *all* of the facts that the government intends to prove at trial. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212, 218 (1960) (suggesting that an indictment may be drawn "in general terms"); *Cochran* v. *United States*, 157 U.S. 286, 290 (1895) (noting that there are "[f]ew indictments * * * which might not be made more definite by additional allegations" but that "the true test is, not whether [the indictment] might possibly have been made more certain, but whether it * * * sufficiently apprises the

defendant of what he must be prepared to meet"); *United States* v. *Britton*, 107 U.S. 655, 663 (1883) (rejecting claim that factual allegation in indictment was insufficient, because a contrary result "would carry refinement in criminal pleading to an impracticable extent").

The Court has also repeatedly stated that it is ordinarily sufficient if an indictment merely sets forth the elements of the offense in the words of the statute—thereby suggesting that it is ordinarily sufficient for an indictment to provide factual detail only with regard to non-elements such as time and place. See pp. 3-4, *supra*; cf., *e.g.*, *United States* v. *Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (stating that "we have consistently upheld indictments that do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime") (citation and internal quotation marks omitted). As to the elements themselves, an indictment that satisfies the Grand Jury Clause should generally provide sufficient notice for purposes of the Sixth Amendment. See pp. 18-20, *infra* (discussing *Russell* v. *United States*, 369 U.S. 749 (1962)). Notably, this Court has upheld an indictment that failed to specify the "particular means" by which the crime was committed, on the ground that "[t]he means of effecting the criminal intent * * * or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessarily to be incorporated in an indictment." *United States* v. *Simmons*, 96 U.S. 360, 364 (1878) (citation omitted); cf. Fed. R. Crim. P. 7(c)(1) (stating that an indictment "may allege that the means by which the defendant committed the offense are unknown or that the

defendant committed it by one or more specified means").

When measured against those standards, the indictment in this case was plainly sufficient. The indictment identified the date and place of the attempted unlawful reentry: *i.e.*, that respondent attempted to reenter the country unlawfully "[o]n or about June 1, 2003, * * * at or near San Luis in the District of Arizona." Pet. App. 2a. Those factual details were sufficient to enable respondent to prepare his defense, particularly in light of the relatively finite means that an individual could use to attempt to effectuate unlawful reentry at the border (*i.e.*, physically sneaking over the border or fraudulently seeking to enter at a port of entry). If respondent had not been present on the specified date at the specified place, his defense would in no way have been affected by the indictment's failure to identify the step (or steps) he took toward reentry. And if respondent had been present at the time and place alleged, he would presumably be aware of his version of events (and therefore fully able to prepare his defense). In that regard, the indictment in this case is closely analogous to an indictment for other simple offenses such as assault, which need at most identify the time, place, and victim of the offense—and need not specify the means by which the offense was committed (*e.g.*, whether the assailant wielded a candlestick or a revolver). See 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(b) at 772 & n.57 (2d ed. 1999) (LaFave) (citing cases). As one commentator has noted, "comparatively little information is needed to prepare a defense for [such] crimes." *Id.* at 771-772.

Respondent has conceded that he had sufficient notice of the factual evidence that the government pos-

sessed of his attempted reentry, insofar as the government disclosed in discovery evidence of the specific actions that respondent took at the border. Oral Arg. Tr. 34 (acknowledging, in response to question, that respondent "kn[e]w beforehand that the Government was going to present evidence of two false identifications"). Respondent instead has suggested only that the *indictment* provided insufficient notice of the charge against him because it did not expressly allege those specific facts. But the indictment need not provide such a specific level of detail in order to allow respondent to frame his defense.[9]

3. Federal courts have routinely held that an indictment for a federal attempt offense need not specifically allege the acts or means by which the defendant attempted to commit the corresponding substantive offense—even in decisions that preceded the promulgation of Federal Rule of Criminal Procedure 7(c), which simplified the pleading standard for federal indictments. Most notably, numerous courts of appeals have rejected claims that, in an indictment for attempted tax fraud, the indictment must allege the means by which the defendant sought to effectuate the fraud. In *Hardesty* v. *United States*, 168 F. 25 (6th Cir. 1909), the court asserted that "[i]t is not fatal * * * that the indictment does not set out the particular acts which are to be relied upon to prove that the government was defrauded out of the tax, or an unsuccessful attempt made to so

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[9] In any event, respondent would plainly be unable to show prejudice from any deficiency, in light of his concession that he had sufficient notice by the time of discovery. Respondent would therefore not be entitled to reversal on any claim of deficient notice from the indictment. See U.S. Br. 23-27.

defraud." *Id.* at 29. Instead, the court reasoned, "[i]t is enough to charge the offense in the words of the statute, as it * * * leaves no room for doubt as to the offense charged and which the defendant is called upon to meet." *Ibid.* Similarly, in *May* v. *United States*, 199 F. 42 (8th Cir. 1912), cert. denied, 227 U.S. 678 (1913), the court rejected the argument that an indictment failed to "advise the defendant of the manner in which he attempted to commit the fraud, so as to enable him to prepare his defense." *Id.* at 45. The court upheld an indictment that alleged only the time and place of the alleged fraud (and the amount that was the subject of the fraud), reasoning that "[t]o have alleged in this indictment how the defendants attempted to defraud the United States would have required a statement of much of the evidence presented at the trial." *Id.* at 46.

In *Capone* v. *United States*, 56 F.2d 927 (7th Cir.), cert. denied, 286 U.S. 553 (1932), the indictment alleged that the defendant, on a date certain, "well knowing all the premises, unlawfully and fraudulently did then and there willfully attempt to evade and defeat the income tax aforesaid upon his said net income" for the previous year. *Id.* at 929 n.3. The court rejected the defendant's argument that the indictment was invalid under this Court's decision in *Cruikshank*. *Id.* at 930-931. The court acknowledged that "the form used [in the indictment] is indeed quite general." *Id.* at 931. The court reasoned, however, that the generality did not render the indictment invalid, but instead would have "abundantly justified [the defendant] in asking the court to require the district attorney to furnish a bill of particulars as to the specific attempts to evade and defeat." *Ibid.* The court concluded that the defendant "made no

such request, and he now has no reason to complain." *Ibid.*[10]

More recently, federal district courts have rejected claims that indictments for various other federal attempt offenses are deficient on the ground that they fail to identify the "substantial step" taken by the defendant toward the completion of the corresponding offense. See, *e.g.*, *United States* v. *Gregory*, No. 03-CR-50027-1, 2003 WL 21698447, at *1 (N.D. Ill. July 21, 2003); *United States* v. *Bolden*, No. 95-40061-01, 1995 WL 783638, at *2 (D. Kan. Dec. 20, 1995). In many of those cases (as here), the defendant appears to have alleged that the indictment was also deficient because it failed to allege that the defendant had taken a "substantial step" in the first place. See, *e.g.*, *McDarrah*, 2006 WL 1997638, at *8; *Wood*, 6 F. Supp. 2d at 1218. In holding that an indictment that does not identify a "substantial step" is constitutionally valid, courts have disagreed only as to whether the government is required to produce a bill of particulars in response to a request that it identify the step (or steps) on which it intends to rely at trial. Compare *id.* at 1219 (requiring bill of particulars), with *Gregory*, 2003 WL 21698447, at *1 (holding that bill of particulars was unnecessary in light of the terms of the indictment and the government's "open door" discovery policy). Finally, the accepted practice under Federal Rule of Criminal Procedure 31(c) of allowing an indictment for the completed crime to suffice

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[10] See also, *e.g.*, *Reynolds* v. *United States*, 225 F.2d 123, 126 (5th Cir.), cert. denied, 350 U.S. 914 (1955); *United States* v. *Miro*, 60 F.2d 58, 60-61 (2d Cir. 1932); *Enders* v. *United States*, 187 F. 754, 757-758 (7th Cir.), cert. denied, 223 U.S. 719 (1911). But see *United States* v. *Ford*, 34 F. 26, 27 (W.D.N.C. 1888); *United States* v. *Ulrici*, 28 F. Cas. 328, 330 (C.C.E.D. Mo. 1875) (No. 16,594).

for an attempt crime (such that the attempt crime need not be mentioned at all) seems difficult to square with a requirement that the indictment provide specific information about the particular substantial step that undergirds the attempt crime. See p. 10, note 7, *supra*.

In sum, federal courts have generally held that an indictment for an attempt offense need not specify the "substantial step" taken by the defendant toward the completion of the corresponding substantive offense. There is no justification for a different result in this case.

C. Neither *Russell* v. *United States* Nor Older State Court Pleading Practices Require A Federal Attempt Indictment To Allege A Specific Substantial Step

1. This Court's decision in *Russell* v. *United States*, *supra*, does not compel a different conclusion. In *Russell*, the defendants were charged with refusing to answer a question that was "pertinent to the question under inquiry" by Congress, in violation of 2 U.S.C. 192. *Russell*, 369 U.S. at 752 n.2, 755. The Court held that the indictment in that case provided insufficient notice (and that the deficiency in the indictment warranted automatic reversal). *Id.* at 771-772. As a preliminary matter, *Russell* appears distinguishable on its facts, because the Court pointedly noted—using one defendant's case as an example—that the government in the cases before it presented a *different* factual theory (or no theory at all) "[a]t every stage in the ensuing criminal proceeding." *Id.* at 768. *Russell* also heavily relied on a unique function of an indictment under 2 U.S.C. 192: namely, that it provide enough detail to permit federal courts to decide, as a matter of law and before trial, whether the question put to the witness was "pertinent

to the question under inquiry" by Congress. 369 U.S. at 757-759, 772; see *id.* at 756-757.[11]

Russell does also suggest that, where an indictment fails to provide factual detail concerning a particularly vital element of the offense, it can "violat[e] * * * the basic principle 'that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him.'" 369 U.S. at 766 (quoting *Simmons*, 96 U.S. at 362). *Russell*, however, does not stand for the broader proposition that an indictment must allege factual detail concerning *every* element of the offense; instead, it deals only with special circumstances in which a particular element must be specified in order for the court and the defendant to determine what specific crime is being alleged. See *id.* at 764 (explaining that "the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer" and that "[w]here guilt depends so crucially upon such a specific identification of fact * * * an indictment must do more than simply repeat the language of the criminal statute"). In so holding, the Court in no way abrogated or modified the general rule that an indictment need only set forth the alleged crime with *reasonable* factual particularity. See, *e.g.*, *Hess*, 124 U.S. at 487-488; *Cruikshank*, 92 U.S. at 558. And the Court has refused to read *Russell* as requiring an indictment to

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[11] This Court's precedent at the time made "pertinency" an issue of law for the court to decide. *Russell*, 369 U.S. at 755-756 (citing *Sinclair* v. *United States*, 279 U.S. 263 (1929)). This Court has since overruled that precedent, *United States* v. *Gaudin*, 515 U.S. 506, 519-521 (1995) (overruling *Sinclair*), and it has not reconsidered *Russell*'s view about the requisites of an indictment under Section 192 in light of current doctrine.

spell out the meaning of an element that has an accepted legal definition. *Hamling*, 418 U.S. at 118-119. *Russell* has not been extended beyond the context in which it arose, and it should not be construed to require an indictment alleging a federal attempt offense to identify a "substantial step" taken by the defendant toward the completion of the corresponding offense.

2. In the nineteenth and early twentieth centuries, many *state* courts held that an indictment for an attempt offense was deficient unless it specified the act that constituted the attempt. See, *e.g.*, Francis Wharton, *A Treatise on the Criminal Law of the United States* § 292, at 222 (4th ed. 1857) (stating that, while "the same particularity is not necessary [in indictments for attempt offenses] as is required in indictments for the commission of the offense itself," "it is necessary that some act constituting such attempt (e.g., an assault,) should be laid").[12] Other state courts, however, took the opposite view, and (like the more recent federal cases

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[12] See, *e.g.*, *Miller* v. *State*, 95 So. 83, 84 (Miss. 1923); *Wilburn* v. *State*, 97 S.E. 87, 88 (Ga. Ct. App. 1918); *Bond* v. *State*, 152 P. 809, 809 (Okla. Crim. App. 1915) (per curiam); *State* v. *Donovan*, 90 A. 220, 222-223 (Del. Gen. Sess. Ct. 1914); *State* v. *George*, 140 P. 337, 338-339 (Wash. 1914); *Smith* v. *State*, 94 N.W. 106, 107 (Neb. 1903); *Hogan* v. *State*, 39 So. 464, 465 (Fla. 1905); *State* v. *Doran*, 59 A. 440, 441 (Me. 1904); *State* v. *Hager*, 40 S.E. 393, 394 (W. Va. 1901); *Kinningham* v. *State*, 21 N.E. 911, 911 (Ind. 1889); *State* v. *Frazier*, 36 P. 58, 59 (Kan. 1894); *Clark* v. *State*, 8 S.W. 145, 145 (Tenn. 1888); *State* v. *Colvin*, 90 N.C. 717, 719 (N.C. 1884); *Gandy* v. *State*, 14 N.W. 143, 144-145 (Neb. 1882); *Thompson* v. *People*, 96 Ill. 158, 161 (1880) (per curiam); *State* v. *Brannan*, 3 Nev. 238, 239 (1867); *State* v. *Wilson*, 30 Conn. 500, 503-506 (1862); *Commonwealth* v. *Clark*, 47 Va. (6 Gratt.) 675, 684 (Va. Gen. Ct. 1849); *Randolph* v. *Commonwealth*, 6 Serg. & Rawle 398, 399 (Pa. 1821) (per curiam).

discussed above) held that an indictment for an attempt offense need not specify any particular act.[13]

To the extent that the prevailing view in state courts at one time was that an indictment must allege the act that constituted the attempt, those decisions do not shed significant light on the question presented here. First, those decisions do not appear to rest on any federal constitutional ground. The Grand Jury Clause, of course, does not apply in state criminal prosecutions, see *Hurtado* v. *California*, 110 U.S. 516, 538 (1884), and none of those decisions appears to have relied on the Sixth Amendment's notice requirement in holding that an indictment was insufficient.

Instead, those decisions should be understood as applying common-law pleading requirements, which were widely used during that period and involved a "prolix and archaic form of indictment couched in Elizabethan English." Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 Geo. Wash. L. Rev. 119, 124 (1944); see 4 LaFave § 19.1(a) at 732 (noting that "courts came to demand that the pleading contain a full statement of the facts and legal theory underlying the charge"; "[i]ndictments were lengthy, highly detailed, and filled with technical jargon"; and "American courts demanded strict adherence to the technical niceties of common law pleading rules"). Those common-law pleading requirements went well beyond what the Constitution required, as this Court seemingly recognized at the time. See *Gooding*, 25 U.S. (12 Wheat.) at 474 (stating that, "[a]t the common law, in certain descriptions of offenses, * * * great nicety and particularity are often neces-

[13] See, *e.g.*, *State* v. *Stevens*, 65 P.2d 612, 614 (Mont. 1937); *State* v. *Topham*, 123 P. 888, 892-893 (Utah 1912); *Jackson* v. *State*, 8 So. 773, 773 (Ala. 1891); *People* v. *Bush*, 4 Hill 133, 134-135 (N.Y. Sup. Ct. 1843).

sary," but that "[i]n general * * * it is sufficient certainty in an indictment to allege the offence in the very terms of the statute"). As States adopted simplified pleading requirements that more closely paralleled the constitutional minimum requirements (as the federal government did with the adoption of Federal Rule of Criminal Procedure 7(c) in 1946), state courts have more frequently, if not entirely consistently, upheld indictments for attempt crimes that do not allege a specific act.[14]

Second, state courts appear to have required indictments to allege the act that constituted the attempt because, at the time, the meaning of the term "attempt" was still relatively uncertain. See, *e.g.*, 1 Francis Wharton, *A Treatise on Criminal Law* § 229, at 298 (11th ed. 1912) (explaining that "'attempt' is a term peculiarly indefinite" with "no prescribed legal meaning").[15] In the federal system (and, indeed, in most state systems), however, the meaning of the term "attempt" is now well-settled. An indictment can therefore rely on that accepted legal meaning to communicate to the defendant the nature of the charge. See *Jackson* v. *State*, 8 So. 773, 773 (Ala. 1891) (holding that, because "[t]he word 'attempt' * * * in this state has a defined legal meaning, * * * an indictment for an 'attempt' to commit an

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[14] See, *e.g.*, *State* v. *Sodders*, 304 N.W.2d 62, 66 (Neb. 1981); *State* v. *Pepka*, 37 N.W.2d 189, 189-190 (S.D. 1949); *People* v. *Miller*, 42 P.2d 308, 308 (Cal. 1935); *State* v. *Wray*, 253 P. 801, 802 (Wash. 1927).

[15] In addition, at least some of the cases cited above involved statutes that not only required the defendant to have "attempted" to commit an underlying offense, but specifically required the defendant to have committed some "act" toward the commission of that offense. See, *e.g.*, *Thompson*, 96 Ill. at 161; *Commonwealth* v. *Clark*, 47 Va. (6 Gratt.) at 677-678, 684.

offense is not indefinite, and does not charge any act not penal"); pp. 5-7, *supra*.

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The indictment in this case was constitutionally valid because it sufficiently alleged all of the elements of the offense of attempted unlawful reentry and provided respondent with sufficient factual detail concerning the charge against him. The decision of the court of appeals may be reversed either on that ground or on the ground on which the government sought review: namely, that, even assuming that the indictment failed to allege an element of the offense, any error is harmless where, as here, a properly instructed petit jury returned a guilty verdict.

CONCLUSION

For the foregoing reasons and those stated in the government's opening and reply briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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